Supreme Court, U.S.
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No. 98-04

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ARKANSAS DEPARTMENT OF EDUCATION,
VOCATIONAL AND TECHNICAL
EDUCATIONAL DIVISION,
Petitioner,

v.

RICHARD JACOBY, FREDDIE MAE GREEN,
JEAN MARROW, ELSIE SANCHEZ, EVAN SANDERS,
GEORGE THOMAS, BARBARA WHITTAKER,
and SHIRLEY WILLIAMS,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

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MEMORANDUM FOR RESPONDENTS

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MEMORANDUM FOR RESPONDENTS

The respondents, Richard Jacoby *et al.*, do not oppose the grant of the Arkansas Department of Education's *certiorari* petition in the instant case. The petition (at pp. 4-7) fairly and succinctly states the procedural history and nature of this case and the essence of the Arkansas Supreme Court's decision. So as not to burden the Court we accept that statement for present purposes.

The Arkansas Supreme Court's decision—which upholds the validity of an Act of Congress—is, we believe, entirely correct, both in its basics and in its understanding of this Court's precedents. If that decision stood alone, we would argue against further review by this Court and do so on that ground.

But, we recognize that the decision below does not stand alone. The question of the interplay between Congress' Article I legislative powers and state sovereign immunity presented by this case and squarely decided by the Arkansas Court is a recurring one, is most certainly a question of importance and—particularly after this Court's decision on a related Article I/Eleventh Amendment question in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996)—is a question that has generated a current, live conflict in the state courts.

That conflict is most evident from *Alden et al. v. State of Maine*, 715 A.2d 172 (Me. 1998) pet. for *cert.* filed September 14, 1998 (No. 98-436). In *Alden*, as in this case, state employees brought a state court Fair Labor Standards Act overtime pay lawsuit against a State. And, the Maine Supreme Judicial Court, in a decision issued less than 6 months after the Arkansas Court's decision herein, upheld the State's sovereign immunity claim and non-suited the state employee plaintiffs. The Maine Court thus rendered Congress' legislative action in authorizing such suits null and void and did so in the face of the Arkansas Court's decision recognizing the force and effect of the same Act of Congress.

The Arkansas and Maine decisions, moreover, are in conflict not only in result but in their understanding of this Court's precedents and, ultimately, of the nature and extent of Congress' Article I powers, the nature and extent of the States' sovereign status in our federal system, and the constitutional plan for allocating federal authority and state authority in this regard.

As to this conflict in the lower state courts see Pet. 9-10 (citing both pre-*Seminole Tribe* and post-*Seminole Tribe* state court decisions), as well as the following decisions (in addition to the *Alden* decision discussed above) issued after the petition here was filed: *Whittington v. State of New Mexico Dept. of Public Safety*, N.M. Ct. App. Docket No. 19,065 (September 3, 1998); *Alhern et al. v. State of New York*, N.Y. Sup. Ct., App. Div., No.

80430, 1998 WL 38623 at *2 (July 9, 1998); and *Bunch v. Robinson*, 122 Md. App. 437, 712 A.2d 585, 595 (Md. Ct. Spec. App., 1998) pet. for *cert.* to Maryland Court of Appeals pending.

CONCLUSION

In light of the foregoing, respondents do not oppose a grant of the petition for a writ of certiorari in this case.[1]

Respectfully submitted,

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[1] We note that if the Court were to grant *certiorari* here the Court might also wish to grant *certiorari* in *Alden et al. v. State of Maine*, No. 98-436, and to consolidate the two cases for argument and consideration.

The *Alden* case presents a second significant related question that is not presented by the instant case, and that may furnish a separate basis for decision in that case. (That question is "If a state court may properly refuse to entertain . . . a federal statutory private party action on the basis of state sovereign immunity in certain circumstances but not in others, may a state court do so in the circumstance in which that court entertains analogous state statutory actions?" *Alden* Pet. i.)

Hearing both cases together would thus provide the Court with a clear opportunity to consider and resolve both aspects of the current Article I/state sovereign immunity legal controversy in a single proceeding.